No. 76-1017

In the Supreme Court of the United States

OCTOBER TERM 1976

SCOTT GRANT, an infant,

Petitioner,

vs.

PARKE, DAVIS & CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARLO McKINNON and
GEORGE P. KERSTEN
231 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203

CHARLES B. CANNON
135 S. LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioners

Of Counsel.
KERSTEN & McKINNON
231 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

In the
Supreme Court of the United States

OCTOBER TERM 1976

NO.

SCOTT GRANT, an infant,

Petitioner,

vs.

PARKE, DAVIS & CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Scott Grant, an infant, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals entered in this action on October 27, 1976.

OPINIONS BELOW

The unpublished order of the Court of Appeals appears in the appendix hereto at page App. 1. The unreported opinion of the District Court appears in the appendix hereto at page App. 16.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered October 27, 1976. This petition for certiorari was filed within 90 days of that date. This court has jurisdiction under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The questions presented in this case are:

1. Whether original answers to interrogatories concerning main issues should be admitted as admissions of the answering party and/or as impeachment of subsequent inconsistent answers and positions taken at the trial.

2. Whether granting collateral estoppel to preclude relitigating one issue bars admitting all testimony relating to that issue even when such testimony also relates to and is offered on other main issues.

3. Whether pre-trial deposition testimony for use at trial elicited on cross-examination without objection or motion to strike at that time, may later at the trial be stricken and kept from the jury because it relates to an issue collaterally estopped, even though it also relates to and is offered on other main issues.

4. Whether erroneous exclusion of relevant and material evidence offered by the losing party having the burden of proof is ground for a new trial even though there is other evidence in the record that would have supported a verdict for that party.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case which appear in full text in the appendix hereto, at page App. 22, are Rule 32(b), Rule 32(d)(3) and Rule 33(b) of the Federal Rules of Civil Procedure; Rule 401, Rule 402 and Rule 403 of the Federal Rules of Evidence; Wisconsin Statutes, Sec. 904.03.

STATEMENT OF THE CASE

A. Nature of case, course of proceedings and disposition below.

This is an action by a now 15 year old child to recover for catastrophic permanent and totally disabling brain damage with resulting paralysis of both sides of the body and mental and motor retardation since the age of six months. The child alleges he suffered this damage from a series of inoculations of a defective vaccine manufactured by the defendant-appellee drug company under the trade name of Quadrigen which he received in 1961, at four, five and six months of age.

The drug company denied the child was inoculated with Quadrigen and claimed even if he were, it was not the cause of his brain damage.

Because of prior court decisions finding Quadrigen defective, the trial court ruled in advance of the trial that the drug company was collaterally estopped from relitigating whether Quadrigen was defective. The case then proceeded to trial on the remaining issues: whether Quadrigen was in fact the drug used, and if so whether it caused the child's brain injury and damage.

At trial the drug company claimed it had suspended production of Quadrigen and that it was not on the market at the time in question.

In rebuttal the child offered in evidence the drug company's original answers to interrogatories in which it swore it had never withdrawn, ceased or suspended the sale or distribution of Quadrigen until sometime after the child was inoculated. The child further offered the original answers of the drug company repeatedly stating it had no

records regarding sale and distribution of Quadrigen for 1961 and the pre-trial testimony of the drug company's house counsel in charge of Quadrigen litigation that its file most likely to show whether Quadrigen was available and being used at the crucial time had been destroyed by the drug company.

The trial court erroneously excluded the interrogatory answers. It also erroneously excluded the evidence of destruction of records by the drug company on the ground such evidence dealt with the defectiveness of the drug, already found, without recognizing such evidence was also relevant to the remaining issues of identification and cause as well as to the credibility of the drug company's evidence. On the same ground the court prejudicially excluded other defense interrogatory answers and much of the child's rebuttal evidence as detailed in the following facts and argument.

The court also permitted the drug company unfairly to edit out of the evidentiary deposition transcript of the child's medical expert virtually all answers unfavorable to the drug company elicited on its cross-examination, *even though no objection or motion to strike had been made at the deposition.*

The trial court instructed the jury the child must prove both that Quadrigen was the drug used and that it was the medical cause of the brain damage before they could find in favor of the child. The jury returned a general verdict in favor of the drug company.

The child moved for a new trial on the ground the rulings excluding his evidence had substantially prejudiced him and kept from the jury material and relevant evidence on the two issues on which the court required he sustain the burden of proof. The trial court denied this motion.

The child appealed from the amended judgment entered on July 8, 1975 and from the decision and order denying his motion for a new trial dated January 27, 1976. The Court of Appeals for the Seventh Circuit on October 27, 1976 in an unpublished opinion and order affirmed the District Court.

B. The Facts.

The plaintiff Scott Grant (hereinafter referred to as the "child") was born June 4, 1961. The complaint alleges that at the ages of four, five and six months he received a series of inoculations of a so-called "4-in-1" product known as Quadrigen, which is an immunization containing four components: diphtheria toxoid, pertussis (whooping cough) vaccine, tetanus toxoid and polio vaccine. Quadrigen is manufactured by defendant-appellee Parke, Davis & Co. (hereinafter referred to as the "drug company").

The history of Quadrigen and its dangerous qualities has been litigated in several earlier cases which contain extensive analyses of Quadrigen and its propensity to cause brain damage in infant-recipients.[1]

During pre-trial discovery proceedings the child put to the drug company a number of written interrogatories inquiring about the marketing of Quadrigen, its use, its tendency to cause brain damage and other relevant matters. *Just six months* prior to the trial, the drug company responded that Quadrigen had never been withdrawn from the

---

[1] *Stromsoldt* v. *Parke, Davis & Co.* (1966), 257 F.Supp. 991, affirmed on appeal in *Parke, Davis & Co.* v. *Stromsodt* (8 Cir. 1969), 411 F.2d 1390; *Tinnerholm* v. *Parke, Davis & Co.* (S.D.N.Y. 1968), 285 F.Supp. 432, affirmed on appeal in *Tinnerholm* v. *Parke, Davis & Co.*, (2 Cir. 1969), 411 F.2d 48, and *Vincent* v. *Thompson and Parke, Davis & Co.* (Supp. Ct. 1974), 361 N.Y. Supp.2d 282, rev. 377 N.Y. Supp. 2d 118 (1975)

market and to the effect that production of Quadrigen had never been ceased or suspended during any time relevant to this case (prior to 1962). The drug company's answers further stated the package insert dating period for Quadrigen expressly covering the time the child received his inoculations.

In other answers the drug company stated it had no records dealing with its 1961 distribution and sale of Quadrigen (Interrogatory 9), no records relating to whether there were bulk shipments of Quadrigen made to Dr. Weatherhogg, the pediatrician who gave the child his shots (Interrogatory 26), no records dealing with whether any other kind of sale was made to Dr. Weatherhogg (Interrogatory 27), no information upon which the drug company could determine whether the child was injected with Quadrigen on the days in question and no information indicating which vaccine the child received (Interrogatories 30 and 31).

Shortly after these answers were filed by the drug company, the child brought a motion to apply the doctrine of collateral estoppel to the issues of defect, negligence and notice to the medical profession.

During the pre-trial proceedings the drug company also questioned the pediatrician (Dr. Weatherhogg) who had inoculated the child, and verified he no longer had his 1961 drug-purchase records and therefore had no documentation to confirm he had Quadrigen in his office at the time in question.

The drug company then made so-called "supplemental" and "further answers" to the interrogatories, which claimed it had found some records showing Quadrigen was not available at the time in question; that production of Quadrigen had been suspended for a period prior to the time the child received his inoculations and that no Quad-

rigen was on the market or available for use within its shelf-life at that time. The drug company's counsel explained the drug company's original answers to interrogatories in which it disclaimed the existence of such records on the ground that after further search (after it verified Dr. Weatherhogg had no records to substantiate his testimony he had administered Quadrigen to the child) the drug company found it did in fact have such records because they had been needed in connection with a tax case in 1961. From that point forward a principal defense asserted by the drug company was that Quadrigen was not available at the time in question for inoculation into the child.

The trial court decided the motion for collateral estoppel in favor of the child and entered an order finding Quadrigen "was defective in that it exposed recipients to an unreasonable danger of damage to the brain and central nervous system" and that by reason of "the defendant's failure properly and adequately to test it and adequately to warn the medical profession of the risks inherent in its use, the defendant Parke, Davis & Co. was negligent."

The case proceeded to jury trial on the remaining issues of identification of Quadrigen as the drug injected into the child and medical cause and damage. These two remaining issues involved essentially two questions:

(a) The "identification" issue: whether Quadrigen was in fact the product inoculated into the child. This involved principally the drug company's contention that Quadrigen was not on the market and available at the time the child was inoculated.

(b) The "medical cause" issue: whether, if the inoculations were Quadrigen, they produced the brain damage sustained by the child.

At trial, the child attempted to present the videotape deposition testimony of his principal medical witness on the issue of medical cause, Dr. J. Gordon Millichap. Dr. Millichap had been the chief of the neuropediatric section of the Mayo Clinic and had treated the child when, following his third inoculation, the signs of brain damage began to appear. He testified that, according to his record and to his own memory, the mother had identified the inoculations as "Quadrigen" when she reported the child's medical history to Dr. Millichap in early 1962, at the Mayo Clinic. Dr. Millichap further testified those Quadrigen shots were the cause of the child's brain damage and seizures.

A lengthy cross-examination was done by the drug company's counsel, in which Dr. Millichap testified that part of his experience and knowledge upon which he based his opinion were other Quadrigen cases in which child recipients sustained brain damage from it, including cases he himself had treated. He also testified to his awareness that the court in the Grant case had found Quadrigen was defective and exposed recipients to an unreasonable risk of brain damage. During the videotape deposition no objection or motion to strike was made by the drug company's counsel in regard to this testimony when it was elicited by him. But at the trial when the child attempted to present this testimony of Dr. Millichap, the court sustained the drug company's objection to it at that time and the jury was not permitted to hear it.

The drug company presented the testimony of a neonatologist, Dr. Graven, who never saw the child but who testified at considerable length about other cases and literature he had knowledge of upon which he based his opinion, contrary to that of Dr. Millichap's, that the child's brain damage was not caused by the Quadrigen shots.

At the trial the pediatrician and the nurse who had given the child his inoculations identified them as Quadrigen. Dr. Millichap's testimony and the Mayo Clinic's record stated the history taken at the time of treatment at the Mayo Clinic in February 1962 was that the drug inoculated was Quadrigen.

The drug company's defense at trial on this "identification issue" rested principally on the records it claimed it found shortly before the trial, which, it claimed, showed that all of the Quadrigen the government had released for sale was marketed months before the child received his inoculations; that by matching up the records it had produced and under the testimony of various employees of the drug company explaining and interpreting them, it must be concluded that no Quadrigen still within its shelf-life was available at the time the child received his inoculations.

During the cross-examination of the drug company's witnesses and during the child's rebuttal case, his counsel attempted to put in evidence the drug company's original answers to interrogatories, which admitted the product had never been withdrawn from the market nor production ceased or suspended during the time in question. The trial court sustained the drug company's objection to receiving these original answers.

The child's counsel also sought to put in evidence that the drug company had once had the required records dealing with the use of Quadrigen and the reactions of the public to it as reported by doctors, pharmacies and the drug company's own detailmen (salesmen). This was the so-called "quality control" or "adverse reactions" or "complaints" file kept by the drug company on Quadrigen as required by law. In pre-trial discovery the drug company's house counsel in charge of Quadrigen litigation admitted

the drug company had destroyed this file. The child offered this testimony to show that the drug company's record specifically dealing with the use (and therefore availability) of Quadrigen by the public had been destroyed. The trial court sustained the drug company's objection to this evidence.

Dr. Weatherhogg's nurse who ordered Quadrigen for his office and who administered the inoculations to the child testified that on at least two occasions after June 1961 when the drug company claimed it had suspended production, Dr. Weatherhogg's office had received supplies of Quadrigen directly from the drug company's detailman. The records did not cover these direct deliveries.

One of the drug company's former detailmen for the Madison area also testified Quadrigen was available and being delivered directly by him to physicians and other customers during the months of October, November and December 1961 when the child received his shots; and that the drug company's notice to purchasers stated it was then available. The records did not cover these direct deliveries.

In response to the records the drug company eventually produced at the trial and the testimony interpreting them by the drug company's employees, the child sought to introduce the drug company's original answers to interrogatories and the testimony of destruction of other crucial records to show the records the drug company eventually did produce at the trial were not complete, did not reveal the complete facts on the availability of Quadrigen and impeached the credibility of the drug company's subsequent claims it had produced its complete records and that these records established Quadrigen was not available at the time involved.

At virtually each such effort in cross-examination and rebuttal the drug company objected and moved for a mistrial on the ground the evidence offered involved the issue of defect which the court had already found in ordering collateral estoppel. The child's counsel expressly offered such evidence only in rebuttal to the defense on the remaining issues of identification of Quadrigen as the drug injected and its medically causal relation to the child's brain injury.

The trial court uniformly sustained the drug company's objections and none of this rebuttal evidence was heard by the jury.

On this state of the record the jury was instructed that to find for the child they must find he had sustained his burden of proof on both these remaining issues. The jury then found for the drug company and judgment was entered dismissing the child's complaint.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE SQUARELY PRESENTS FOR THIS COURT'S DETERMINATION ISSUES OF NATIONAL SCOPE AND CRITICAL IMPORTANCE CONCERNING THE USE AT TRIAL OF INTERROGATORIES UNDER RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The use of interrogatories and their answers under Rule 33 of the Federal Rules of Civil Procedure involves every type and size of civil action brought in federal courts. This case presents this court with an opportunity, much needed in present trial practice, to clarify the extent to which sworn contradictory interrogatory answers may be put in evidence during trial to rebut another party's advanced position.

The drug company's defense in the District Court on the issue whether Quadrigen was in fact inoculated into the child, the so-called "identification" issue, was based on its contention Quadrigen was not available at the time the child received his shots (October 5, November 4 and December 7, 1961). In rebuttal to this defense of unavailability the child vainly attempted to put in evidence several of the drug company's previous sworn answers to written interrogatories which contradicted its trial defense and tended to establish Quadrigen was available.

A. The interrogatories sought to be introduced and their importance to the child's rebuttal case.

In the District Court the child sought to rebut the defense of unavailability by offering into evidence ten sworn

answers to interrogatories. A brief description of this evidence is necessary to a full understanding of its importance to the child's rebuttal case.

1. Interrogatories 13 and 14.

The drug company's original answers to interrogatories stated Quadrigen had never been withdrawn from the market nor its production suspended until the spring of 1962:

> "13. State whether Quadrigen was ever withdrawn from the market and, if so:
>
> (a) state each reason it was withdrawn from the market;
>
> * * * *
>
> "ANSWER
>
> *Quadrigen was not withdrawn from the market; however, its manufacture and distribution were discontinued sometime prior to May* 5, 1967 *when oral poliomyelitis vaccine* (*Sabin*) caused Quadrigen, which contained inactivated poliomyelitis vaccine, *to become commercially obsolete.*[2]
>
> * * * *
>
> "14. State whether you *ceased or suspended production of Quadrigen at any time,* and if so, state:
>
> (a) *when and for how long production of Quadrigen was ceased or suspended;*
>
> * * * *
>
> (d) identify each record or document relating to such ceasing or suspension of production of Quadrigen.
>
> "ANSWER
>
> *See interrogatory No.* 13."

These sworn interrogatory answers flatly contradicted the drug company's trial defense Quadrigen was not available when the child was inoculated.

---

[2] The record was undisputed oral poliomyelitis vaccine did not come on the market until spring 1962.

2. Interrogatories 7 and 10.

The drug company's original answers to interrogatories 7 and 10 state it sold Quadrigen packages containing inserts specifying use dates from *9-29-59* to *3-26-62* and tended to contradict its later position the drug was not available for use during the crucial part of that period (October through December, 1961, when the child received his shots).

The answer to interrogatory 10 states:

"ANSWER

Attached hereto as Exhibit 1 are copies of the package inserts that accompanied each package of Quadrigen:

Insert Symbol	Use Dates
ZD	*9/29/59* to *3/26/62*

* * *

The drug company's Quadrigen package inserts thus clearly specified use dates covering the period it later claimed Quadrigen was not available.

3. Interrogatories 9, 26, 27 and 30.

The drug company's original answers to interrogatories 9, 26 and 27 denying it had records for the sale of Quadrigen through December, 1961 and its answer to interrogatory 30 denying it had sufficient information to admit the child was injected with Quadrigen in 1961, impeached its later answers and testimony claiming records subsequently found established Quadrigen was not available at the time the child was inoculated.

The drug company claimed at the trial its records on distribution and sale of Quadrigen established Dr. Weatherhogg could not have used Quadrigen in the fall of 1961 and that Quadrigen was not available anywhere at that time.

In contrast, its original answers to written interrogatories, filed just six months before trial, stated no such records existed:

"9. In connection with the distribution and sale of Quadrigen prior to December 7, 1961 state:

* * *

(d) identify each document which establishes or tends to establish the method by which a particular shipment of Quadrigen was sold and delivered.

"ANSWER

* * *

(d) *Lack of records prevents defendant from answering.*"

"26. Were bulk shipments of Quadrigen made to Curtis Weatherhogg, M.D., of Madison, Wisconsin? If so, state:

(a) the documents or records you have of such shipment;

* * *

(c) the dates such shipments were made;

* * *

"ANSWER

Lack of records prevents defendant from answering."

"27. What records of sales to Dr. Curtis Weatherhogg do you have other than bulk sales? With respect to such other records, state:

(a) what they are;

(b) the dates of the sales referred to;

* * *

"ANSWER

Defendant does not currently have any records that might indicate what sales of Quadrigen, if any, might have been made to Dr. Weatherhogg."

"30. Do you deny that Scott Grant was injected with Quadrigen on or about October 5, 1961, November 4, 1961 and December 7, 1961?

"ANSWER

Defendant does not have sufficient information to admit, and therefore denies the allegation."

These original answers too were contradicted shortly before trial by "further answers" and "supplemental answers." In these later answers the drug company in effect claimed that, despite a general policy of destroying old records, its records for the early 1960's (including those relating to Quadrigen for the year 1961) had been preserved because of a tax case. The "newly found" records turned out to be fifty-three large boxes of invoices for the drug company's Skokie, Illinois distribution facility whose territory includes Madison, Wisconsin. Additional crucial production records were even later allegedly found in a desk drawer at the plant in Detroit. When the drug company's designates were questioned to identify these records, substantially all the Quadrigen records seemed to have been found except those most crucial to proving the child's side of the case—the Skokie, Illinois *inventory* records on the Quadrigen it received and the quality control or "complaint" (adverse reaction and side effects) file on Quadrigen (which is the file establishing experience in the *actual use* of the drug by the *public*). Roemer, the drug company's house counsel in charge of Quadrigen litigation, testified in a pre-trial deposition that these were destroyed. That testimony was excluded from the jury.[3]

The claimed finding of 1961 records occurred after the drug company learned the child's pediatrician (Dr. Weatherhogg) no longer had records to confirm his receipt of Quadrigen in the summer and fall of 1961.

---

[3] Because Quadrigen has been in litigation continuously almost from its introduction, this destruction of quality control files had to have been done while the quality—i.e., safety for use as a vaccine—was actually being litigated.

The "newly found" records constituted the foundation for the entire defense of non-availability of Quadrigen. The inconsistency of the drug company's answers to interrogatories alone would have constituted a substantial impeachment of that defense. Taken together with the destruction of the Skokie inventory records (admitted by the drug company's witness Heisler), and the destruction of other records which the child should have been able to prove through the witness Roemer (particularly the files containing reports from the public on use of Quadrigen which bore directly upon the availability issue), the significance of the drug company's original answers and its subsequent production of only some of the pertinent records would have constituted an even more forceful impeachment of its entire case.

4. Interrogatories 21 and 22.

On the issue of medical cause, the drug company's original answers to interrogatories 21 and 22, admitted the pertussis component of Quadrigen was capable of producing brain damage and was "the most probable component which could cause brain damage." These answers should have been admitted and considered by the jury in connection with the court's finding that Quadrigen as formulated by the drug company exposed recipients to an unreasonable danger of brain damage, particularly in rebuttal to the testimony of the drug company's medical witness that Quadrigen was not the cause of the child's brain damage.

The child was entitled to have these admissions considered in conjunction with the court's formal finding that Quadrigen "exposed recipients to an *unreasonable* danger of damage to the brain and central nervous system," precisely the causal relationship found in prior Quadrigen

cases. To deprive the child of this admitted tendency of the pertussis component to cause brain damage, as plainly stated in the drug company's original answers to interrogatories (rather than as explained away by Dr. Graven), was to vitiate the court's finding that, for *Quadrigen* recipients, there was an *unreasonable* risk of brain damage, and seriously prejudiced the child's position that Quadrigen was the cause of his brain damage.

B. The Trial Court and Court of Appeals have ignored the Federal Rules and applicable case law in refusing to permit the child to introduce the drug company's original answers to interrogatories.

The trial and appellate court refusals to admit prior interrogatory answers by the drug company cannot be reconciled with the Federal Rules of Civil Procedure and case authority interpretive thereof. Rule 33(b), F.R.Civ. P., provides as follows:

> "(b) Scope; Use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence. . . ."

Nothing in Rule 33(b) or the Federal Rules of Evidence authorizes the preclusion of inconsistent sworn interrogatory answers.

1. Under the Federal Rules of Evidence the original answers were relevant and material to the issues of whether Quadrigen was the drug used and if so whether it caused the child's brain damage.

Federal Rules of Evidence 401 and 402 require the admission of "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Whether Quadrigen was available at the time the child received his inoculations was virtually determinative of the action. The drug company's original answers it had never withdrawn Quadrigen from the market or ceased or suspended production of it at that time (interrogatories 13 and 14) obviously made it more probable it was available at that time and less probable it was unavailable.

The drug company's original answers it had no records establishing how a particular shipment of Quadrigen was sold and delivered prior to December 7, 1961 (interrogatory 9), that it had no records pertaining to whether there were bulk shipments of Quadrigen to the child's pediatrician and no records indicating what sales of Quadrigen if any might have been made to the pediatrician (interrogatories 26 and 27), all obviously tended to make it less probable that the records they did produce at the trial were complete or that they categorically established the pediatrician could not have used Quadrigen.

The answers were material as well as relevant. Materiality "means the property of substantial importance and evidence is material where it is relevant and goes to substantial matters in dispute or has a legitimate or effective bearing on the decision thereof." *U.S.* v. *DeLucia*, 256 F.2d 487, 491 (7 Cir. 1958). The ability to show the contradictory sworn positions taken by the drug company would have had legitimate and effective bearing on the decision by the jury whether the drug was available at the time and whether the records the drug company submitted at the trial did establish the child's pediatrician could not have used Quadrigen.

2. The original answers were admissible as admissions and as impeachment of the drug company's defenses on both the identification and cause issues.

4A *Moore, Federal Practice* states, Sec. 33.29(1-2), p. 33-165:

> "Thus the (answers to interrogatories) would be admissible for purposes of impeaching the testimony of the person making them or as an admission of the person making them, as interrogatories are always answered by a party. . . ."

To the same effect: 8 *Wright, Federal Practice and Procedure,* pp. 573-574; 7 *Encyclopedia of Federal Procedure,* 377 Sec. 25.450.

Because it is such common practice to introduce answers to interrogatories into evidence, the right to do so is precisely the kind of procedural right a litigant commonly relies upon in judging whether and to what extent he should cross-examine opposing witnesses. The child's counsel in this case did exactly that. Much of the potential cross-examination of the drug company's witnesses was precluded by other rulings of the court discussed more fully below. Much of the balance was waived because, throughout the drug company's presentation of its various records, the child's counsel supposed they could ultimately put before the jury answers to interrogatories contradicting the entire defense. The fact it filed "further answers" and "supplemental" answers meant only it was changing its story. *Nothing could erase the fact that as late as December 13, 1974 the drug company had stated, formally and under oath, that Quadrigen had never been withdrawn from the market nor its production ceased or suspended during any time relevant to this case.*

Contradiction of this major caliber is a standard ground for the relevance and admissibility of the prior inconsistent answers. In *Wade* v. *Lane* (D.C., D.C. 1961), 189 F. Supp. 661, 665 the trial court affirmed the use of a prior inconsistent statement during trial:

> "The court cannot agree . . . (that the inconsistent document should not have been admitted for the jury). First, there is no doubt that the position taken by Mr. Wade in applying for a hacker's license less than three months after the incident here in question, and the answer of the doctor contained in the application, were inconsistent with contentions he was advancing on trial."

See also *New York Life Insurance Co.* v. *Taylor* (1945), 79 U.S. App. D.C. 66, 147 F.2d 297 at p. 299:

> "If later at the trial she takes a position inconsistent with the proofs of death which she has submitted, those statements are admissible as her representations."

As emphasized in *Bauman* v. *Royal Indemnity Co.* (N.J. 1961), 174 A.2d 585, 587, prior inconsistent answers to interrogatories constitute not only the classic mode of impeaching credibility but, because they were sworn, written admissions by a party, constitute the strongest kind of direct evidence.

> "That rule (admissibility of admissions in pleadings even when expressly withdrawn in a later amended pleading) which is applicable through the pleading is unverified, *has greater applicability* where, as here, the document containing the admission is a *sworn answer to a formal interrogatory.*"

3. The original answers were admissible even though the drug company later filed supplemental and further answers tending to contradict or to be substituted for the original answers.

The trial court justified excluding the drug company's original answers on the ground they were "based on a lack of information and were substituted for once the relevant business records were discovered."

The law is unanimous that the filing of subsequent answers, whether contradictory, supplemental or explanatory, is not a ground for excluding the original answers. It was error for the trial court to exclude them. An important case on this point is *Bauman* v. *Royal Indemnity Co.* (N.J. 1961), 174 A.2d 585, 587:

> "We are satisfied that the trial court erred in refusing to permit the plaintiff to introduce the defendant's sworn statement that Frenkel & Company was authorized agent of the defendant. It was a deliberate answer to an interrogatory submitted by the plaintiff and, when proffered by the plaintiff, was admissible in evidence as such . . . It is true that the defendant amended its answer, well in advance of trial, to assert that Frenkel & Company was a general insurance broker and not agent of the defendant. Although the plaintiff does not question the defendant's action in making the amendment . . . or the effect of the amendment in eliminating whatever conclusive or limiting effect the original answer may have had . . . he properly points out that it does not eliminate the indisputable fact that the defendant, at one time, had stated under oath that Frenkel & Company was its authorized agent. That statement, as an admission by a party, was receivable as evidence against it to be weighed with all the other evidence by the trier of the facts. . . ." (Citations omitted)

Because of the special pertinence and cogency of this opinion we urge the court to examine it in full, especially at pp. 587 et seq.

In *Mangual* v. *Prudential Lines, Inc.,* 53 F.R.D. 301 at 302 (E.D. Pa. 1971) the court holds squarely that the fact a defendant's original answers to interrogatories containing admissions favorable to the plaintiff's side of the issue were seasonably amended to contradict or deny such admissions did not preclude the use of the original answers at trial:

> "Since the answer (to the plaintiff's interrogatory) in the instant case clearly constituted an evidentiary admission requested by the adverse party, we must conclude that the disputed answer is admissible despite the amendment."

To the same effect is *State Farm Mutual Automobile Insurance Co.* v. *Porter,* 196 F.2d 834 (C.A. 9, 1951) and the annotation of authorities in 52 ALR 2d 499, 533.

4. The trial court and the appeals court incorrectly cite Moore in support of the trial court's ruling that the claimed subsequent discovery of records made the original answers improper impeachment.

The courts cite Professor Moore as having "spoken to this point quite effectively" in the following language:

> "* * * (A) Party should not be bound by answers to interrogatories if subsequent investigation discloses new facts; the discovery rules are not to be used as a tactical device for tying a party down to a disadvantageous position or for suppressing facts. . . . 4-A Moore, Federal Practice, Sec. 33.29 (2) at 33-171 (2d Edition 1975)"

But this statement in Moore does not refer to any prohibition against using original answers at trial for *impeachment.* It refers only to the rule that a party's interrogatories shall not be used to *limit his proof.*

The drug company was not bound by its original answers so as to preclude it from introducing records it claimed to have discovered later or from filing subsequent answers or attempting to explain its original answers. But in such event plaintiff should have been permitted to *show what the original answers were* and that a *change* was made in them.

The jury should have had before them the original answers and the fact that they were changed in passing upon the credibility as well as the correctness of the original answers and claims of the drug company and upon whether the old, partial Skokie records and the "desk drawer" records told the whole story. This is particularly true here. But for the court's exclusion of it, the evidence would have shown that other important and relevant records of the drug company had been destroyed by it.

The drug company has the right to change its sworn testimony. *McInerney* v. *Wm. F. McDonald Const. Co.* (E.D.N.Y. 1940), 35 F. Supp. 688 at 689. However, as held in *Young* v. *Dodson* (Ark. 1965), 388 S.W.2d 94, 99, which followed *McInerney,* "Of course, the jury would be entitled to know that a change had been made, and to know the nature of that change."

The child was entitled to have read to the jury the drug company's original answers to the interrogatories set forth above. His counsel repeatedly made clear his willingness that the drug company's amended or supplementary answers could be read. *The answers involved went to the*

heart of the drug company's case. The rulings excluding them erroneously and prejudicially eliminated a major portion of the child's rebuttal case.

5. The drug company's original answers to interrogatories were not made irrelevant by the trial court's application of collateral estoppel.

The trial court states:

> "Once the collateral estoppel order was entered, these answers were largely irrelevant."

They would have been irrelevant with regard to negligence and defect because these issues were removed from the jury's consideration by the collateral estoppel order. They were highly relevant however to the *remaining issues whether Quadrigen was in fact the drug administered,* that is whether it was available at the time the child received his inoculations, *and whether it was the medical cause of the child's brain damage.* The answers were offered in rebuttal to the drug company's principal defense of nonavailability, but also to its underlying contention that the records "found" by it were complete and accurate on the issue of availability. They were also relevant on the issue of medical cause in that they disclosed the drug company conceded that the pertussis component of Quadrigen carried the risk of causing brain damage and in connection with the trial court's finding that the drug company's formulation of Quadrigen had unreasonably increased that risk. These answers supported the opinion of the child's chief medical witness as to cause and tended to contradict the opinion of the drug company's medical expert that other conditions were the cause.

The trial court states and the appeals court apparently affirms the statement:

"These answers were prepared before the collateral estoppel order was entered, so that the issues of negligence and defect were prominent in the party's thinking and the answers were given in that context."

If the answers to these fact questions were true when the issues of defect and negligence were in the case, they were equally true after these issues were determined by the court in favor of the child. When the issues of defect and negligence were still in the case the drug company swore it had never withdrawn Quadrigen from the market and had never ceased or suspended production of it until sometime prior to 1967 when oral (Sabin) polio vaccine made Salk injected vaccine and Quadrigen obsolete. It is undisputed oral Sabin polio vaccine did not even come on the market until 1962. The answer of the drug company thereby established it had not ceased or suspended production of Quadrigen prior to 1962, in flat contradiction to the drug company's later claim it had suspended production of Quadrigen when the child received his inoculations in the fall of 1961. This contradiction remains regardless of what issues remain in the case. To classify these original answers as irrelevant because they were given before collateral estoppel was granted means that when it was advantageous to the drug company to deny suspension of production (which would have implied defect in Quadrigen) it could do so. But when the issue of defect is established and it is advantageous to the drug company to claim suspension of production (to shore up its remaining defense of unavailability) it can do so, without the jury being allowed to know it has made the change!

The fact the original answers were given and whether they were at variance with the position later taken by the drug company should have been revealed to and considered by the jury. Failure to allow this misled the jury and

caused them to answer as they did in ignorance of the contradiction between the original answers and the subsequent, contrary position taken by the drug company.

6. The drug company's original answers would not have improperly confused or misled the jury.

The trial court states "these (original) answers were based on a lack of information and were substituted for once the relevant business records were discovered. These records speak for themselves, and the prior answers given when the records had not been discovered, do not constitute proper impeachment. . . . To allow the answers plaintiff desired be read into evidence would have improperly confused and misled the jury and were properly excluded."

(a) The records the drug company did produce did not establish Quadrigen was unavailable at the time the child received his shots.

The drug company's former detailman for the Madison area, Donald W. Schaefer, testified he was distributing Quadrigen there during the months of October, November and December 1961. He identified the drug company's November 1961 card listing for the trade its products that were available and were being actively sold and detailed at that time. The list included Quadrigen. Nurse Wardale who did the ordering of Quadrigen for Dr. Weatherhogg, the child's pediatrician, and who injected the child, testified the drug company's detailman delivered Quadrigen directly to her after June 1961 and that Quadrigen was available in their office at all times through the second half of 1961. She testified she injected the child with it.

This testimony from impartial witnesses contradicted the drug company's claim the records it produced established no Quadrigen was available at that time.

(b) The drug company failed to produce many important records bearing on whether Quadrigen was available at the time the child received his shots.

The drug company's employee Heisler admitted the inventory shipping records of the Quadrigen shipped from the drug company's manufacturing plant to its Chicago distribution center for the Madison area were "not available".

The drug company's employee Troester testified the distribution records the drug company later produced had been retained in her desk drawer at Detroit. Apparently, this incredible reason was supposed to explain the inconsistent original answers to interrogatories and the earlier failure and delay in producing these records.

The drug company's house counsel in charge of Quadrigen litigation, Roemer, testified the drug company's quality control or complaints file, including the reports of doctors and detailmen on Quadrigen at the time in question, had been destroyed.

This testimony showed the records the drug company submitted did not speak the whole story and did not establish Quadrigen was not available when the child received his shots.

If in addition to the testimony of the witnesses Schaefer, Nurse Wardale, Heisler and Troester *the jury had been permitted to consider* the Roemer testimony that the drug company had destroyed its quality control or complaints file, and that in prior answers to interrogatories filed as late as six months before trial it had denied there were any records on the distribution and sale of Quadrigen at the time and place involved, *a more accurate and complete*

basis for considering the credibility of defendant's later claims would have been given to the jury as the law requires. Contrary to the trial court's statement, the relevant business records were not all discovered. There were two records dealing with the precise point in issue: (a) the *inventory* record for Quadrigen in the Skokie distribution center (which covered Madison, Wisconsin). This record was destroyed, or at least not produced: (b) the complaints and quality control file, which contains reports from the *public* on *use* of the product. This was destroyed, though the child was not allowed to so advise the jury. What the drug company did produce and rely on was a combination of inked-in notations of use dates (shelf life) on production records plus an elaborate interpretation by several of its employees.

These records and testimony did not speak for the important records that were destroyed and not produced or explain the testimony of the detailman and the nurse showing that the records produced did not cover Quadrigen furnished to the pediatrician by the detailman during the time in question. *The jury should have been informed of this insufficiency of the records produced in deciding the issue whether Quadrigen was available at the time the child received his inoculations.* It was the refusal of the trial court to permit the jury to have this evidence that misled them.

(c) The jury should have been informed the drug company had destroyed its adverse reactions file.

The district court sustained the drug company's objection to the evidence of the destruction of its adverse reactions (quality control) files on the ground that the subject was

foreclosed by the collateral estoppel order. The appeals court affirms this ruling "because plaintiff was unable to show that these records would prove that plaintiff was administered Quadrigen or injured by it" and states in its footnote:

> "Since there was no action pending or claim made where injections of Quadrigen were alleged to have been given in the later part of 1961, all quality control files pertaining to this period would have been destroyed in the normal course of business prior to the filing of the Grant action in 1969."

In drawing this conclusion, we respectfully point out the appeals court merely adopts the contention of the drug company and that a contrary conclusion, under the record in this case, might well have been drawn by the jury had it been given the opportunity to do so. The record shows that the destruction of the adverse reaction files occurred after Quadrigen litigation had commenced, inasmuch as the drug company admitted retaining the files for at least five years.[4] According to Roemer, destruction of these files was with the express permission of the drug company's legal department and despite their obvious crucial materiality in the pending and ongoing Quadrigen litigation. The drug company in its brief described this destruction as done in the "normal routine of business." The appeals court apparently also accepts this conclusion although the jury was not allowed to pass on it. Contrary to this being the normal routine of business, the records of adverse reactions and complaints concerning Quadrigen were not

[4] Even according to the drug company, Quadrigen was on the market until at least sometime in 1961. It has been in continuous litigation since sometime in 1962. See *Tinnerholm* v. *Parke, Davis & Co.* (2 Cir. 1969), 411 F.2d 48, 50; *Parke, Davis & Co.* v. *Stromsodt* (8 Cir. 1969), 411 F.2d 1390 at 1392.

routine records. They were records the jury would ordinarily expect the drug company to preserve on a product on which it had been repeatedly and continuously sued since the product was marketed. The drug company's claim, adopted without question by the appeals court, that the destroyed files did not contain complaints concerning Quadrigen administered in 1961, is based entirely on the drug company's word to this effect and also on its word that the files in fact were destroyed. It was for the *jury* to pass on the credibility of these claims. All that was really certain was that the files were not produced.

The appeals court states that the "destruction of the records was adequately explained without adverse innuendo" and that therefore "any affirmative probative value of the absence of the record on the causation issue was rendered nugatory." On the contrary, this was the file which contained reports about the use of Quadrigen and its effects from people *outside* the drug company. The destruction of this file by the drug company, with permission of its legal department and after Quadrigen litigation had been commenced, justified several inferences including: that the information therein was adverse to the drug company, including information that the file showed use of Quadrigen at the time in question and that the pattern of symptomatology emerging from the adverse reaction reports argued against the drug company on the issue of medical cause. In any event, the plaintiff was entitled to have the *jury informed* of such destruction, to have had *the jury draw its own inferences* from such destruction. This was particularly crucial in the instant case where a basic issue was the *credibility* of the drug company's defense and its claim that the records it did produce were complete and established the unavailability of Quadrigen at the time of the inoculations. Whether the jury believed

the files were destroyed or simply were not produced by the drug company, informing the jury of their absence from the trial record would have been an important addition to the absence of the inventory records on Quadrigen admitted by the drug company's employee Heisler. The drug company was allowed to portray itself as making a complete presentation of records. The fact was that the records were selective and incomplete. *The child should have been allowed to show that fact to the jury.*

II.

THIS CASE PRESENTS FOR THIS COURT'S RESOLUTION THE QUESTION WHETHER THE SALUTARY DOCTRINE OF COLLATERAL ESTOPPEL WHEN PROPERLY APPLIED TO AVOID UNNECESSARY AND UNFAIR RELITIGATION OF AN ISSUE, BARS ADMITTING EVIDENCE ON OTHER ISSUES WHENEVER SUCH EVIDENCE ALSO RELATES TO THE ISSUE COLLATERALLY ESTOPPED.

The salutary effect of the doctrine of collateral estoppel to obviate relitigating issues already thoroughly and fairly litigated, particularly in the case such as the instant case, has been researched and commented upon at length in both *Vincent* cases (*Vincent* v. *Thompson,* et al, 361 N.Y.Supp. 2d 282 (Supreme Court 1974); 377 N.Y.Supp.2d 118 (Appellate Division 1975). While the trial court correctly applied collateral estoppel in the instant case on the issues of defect, negligence and failure to notify the medical profession, the trial court erroneously sustained the drug company's objections to evidence offered by the child on the remaining issues of whether Quadrigen was the drug used and whether it was the medical cause of the child's injuries, all on the ground that the evidence offered also involved

the issue of defect that had been collaterally estopped. Under these rulings the child was barred from introducing the drug company's contradictory answers to interrogatories, crucially important answers of the child's chief medical witness given on cross-examination were stricken from the witness' videotaped deposition and not allowed to be heard by the jury, the child's cross-examination of the drug company's medical witness and the child's cross-examination of the drug company's director of quality control were severely limited and other highly prejudicial limitations on the child's rebuttal case were imposed, all on the ground such evidence, although offered on the issues of identification and medical cause, also involved the issue of defect that had been collaterally estopped.

As a result the jury did not hear the following evidence: an important part of Dr. Millichap's testimony on medical cause; the cross-examination of Dr. Graven showing that the different time of onset of seizures in other pertussis encephalopathy cases Dr. Graven relied on was explained by the liability of Quadrigen and the highly individual reactions to it when it was exposed to temperature changes and shaking in transportation and marketing; the formal admission of the drug company that the pertussis component of Quadrigen was "the most probably component which could cause brain damage;" the testimony of the drug company's house counsel in charge of litigation that the company had destroyed its adverse reaction (complaints) file on Quadrigen, the file most likely to show the symptomatology of adverse reactions and the best evidence whether Quadrigen was in actual use by the public at the time in question; *the drug company's original sworn answers to interrogatories stating it had not withdrawn Quadrigen from the market; also stating in effect it had not ceased or suspended production of Quadrigen at any rele-*

vant time; the drug company's original sworn answers to interrogatories denying it had records for the sale of Quadrigen through December, 1961; *denying it had any records on what sales of Quadrigen might have been made to Dr. Weatherhogg;* denying it had information sufficient to admit the child was injected with Quadrigen in 1961 and giving *this* as the reason for denying he had been injected with it; the drug company's original answers stating *it sold Quadrigen packages containing inserts specifying use dates including the time the child received his shots; that the medical profession was never notified to observe a shorter dating period as to Quadrigen already on the market as of April* 13, 1961 *and that such Quadrigen was never recalled;* that the real reason more Quadrigen was being returned than was being shipped in late 1961 was not out-dating, as testified by the drug company's employee Heisler, but that the medical community was learning Quadrigen was unstable; plaintiff's offers of proof through Dr. Timm, on the reason for returns of Quadrigen in 1961, that the drug company formed a committee to consider reactions to Quadrigen in 1959 or 1960, recognizing that a substantial problem existed with the instability of Quadrigen and the adverse reactions to it; that it considered lowering the amount of pertussis component to reduce the reaction rate but instead increased the amount to fulfill potency requirements to keep Quadrigen on the market; that the drug company realized that

> "A recheck into the reaction problem with Quadrigen was imperative . . . reports are now coming from practitioners with experience with this product . . . complaints have been noted generally in recent weeks . . . there may be some difficulty in certain patients where unsavory reactions have been experienced . . . it is difficult to believe reactions of a magnitude being reported could have been overlooked in the original extensive field trials with this product." (Plaintiff's offers of proof through Dr. Timm.);

that there was great variation and instability in both the potency and reactivity (toxicity) of Quadrigen and that there was growing recognition of this among medical societies and doctors by 1961. All of this barred testimony was offered on and relevant to the issues of medical cause and the availability of Quadrigen. Also excluded by the trial court was the child's offer of proof through the drug company's house counsel in charge of Quadrigen litigation that the drug company had destroyed its quality control, complaints and adverse reaction files and other records, bearing on the issue of identification of Quadrigen as the drug injected and on the issue of medical cause.

All of the above cited evidence, offered on and relative to the issues of identification and medical cause, was excluded by the court's rulings under collateral estoppel on the ground that it *also* applied to the issue of defect collaterally estopped.

The effect therefore given by the trial court to its correct ruling that collateral estoppel should be applied to the issue of defect, effectively destroyed the child's rebuttal case on the remaining issue of identification of Quadrigen as the drug administered and on the remaining issue of medical cause. The trial court's erroneous rulings, that collateral estoppel on the issue of defect barred all evidence on the remaining issues of identification and medical cause that also related to the issue of defect, permitted the drug company to claim what it wanted to on the identification and medical cause issues and then block effective rebuttal on the ground the defective nature of Quadrigen was thereby involved even if only inferentially or peripherally.

While therefore the district court and apparently the appeals court agree that collateral estoppel was properly applied to the issue of defect, it was unquestionably over-

extended and its purpose defeated by the erroneous rulings of the trial court based upon the approach, apparently also approved by the appeals court, that its application to the issue of defect precluded evidence not only on the issue collaterally estopped, but also barred other evidence relevant and material to the remaining issues of identification and medical cause whenever such other evidence related to or in any way involved the issue of defect collaterally estopped.

The prejudicial effects of this erroneous approach are manifest even in the appeals court decision. For example, on the issue of availability, the child sought to put into evidence the drug company's answer to interrogatory 13 that "Quadrigen was *not withdrawn from the market;*" and also was barred from cross-examining Dr. Timm, the drug company's director of quality control, to show that Quadrigen *was never recalled from the market.* In the absence of the jury the drug company admitted that Quadrigen had never been recalled from the market. With regard to this the appeals court stated:

> "Plaintiff's counsel also attempted to show that after the government regulations establishing the new expiration date for Quadrigen became effective, defendant did not recall already issued Quadrigen. Since Parke-Davis admitted that Quadrigen was never recalled the district judge interpreted counsel's questioning as again bearing on defect. *While it might have been preferable to let this question be answered, there was no need to do so because it was an undisputed matter.* Since the matters plaintiffs sought to establish through cross-examination of Dr. Timm related to the defectiveness of Quadrigen, this line of inquiry was barred by the collateral estoppel order." (emphasis added)

But the crucial fact, apparently overlooked by both courts, is that as a result of the court's rulings *the jury were never informed that there was no recall of Quadrigen already out on the market when the government regulations establishing a shorter expiration date for Quadrigen became effective. The jury were never informed the defendant admitted this both in its interrogatory answer and at the trial.* This evidence went directly to the issue of whether the Quadrigen not recalled was still on the market and available at the time the child received his inoculations. Because of the court's erroneous rulings the child was not permitted to show the undisputed and admitted facts that *the medical profession was never notified to observe a shorter dating period as to the Quadrigen already on the market and that such Quadrigen was never recalled.* Although these facts also involved the drug's defectiveness they also obviously were *directed* to its *availability* at the time in question. As a result of the court's rulings precluding this important information being given to the jury, for all the jury knew the shortened dates applied to all of the available Quadrigen, *including Quadrigen shipped before the effective date of the government's order shortening expiration dates.* Since Quadrigen on the market before the government regulation of April 1961 had a dating period of one year from manufacture and six months from issue, there was no recall of the Quadrigen already on the market and the medical profession was never notified to observe a shorter dating period as to the Quadrigen already on the market, a jury, *informed of these facts,* might well have legitimately inferred and concluded that *Quadrigen within its dating period was still on the market at the time the child received his inoculations,* just as the drug company's detailman and the pediatrician's nurse testified it *was.* To bar this crucial evidence from the jury's consideration on the issue of whether Quadrigen was available at the time the child received his inoculations, merely on the ground that the evidence also related to the defective nature of Quadrigen that had been collaterally estopped, was

to make the doctrine into a Berlin Wall between the jury and the factual truth of the situation. It is no wonder the appeals court states: "It might have been preferable to let this question be answered" and "we might have permitted the plaintiff to introduce some or all of these ten answers if we had been trying this case." It was not merely "preferable" to tell the jury no Quadrigen was recalled and that the medical profession were never notified of a shorter expiration date with respect to Quadrigen already on the market at the time in question: it was absolutely *essential* for the jury to know these facts if they were to have a true understanding of the factual situation on the availability of Quadrigen at the time in question.

If, as was done in this case, the salutary doctrine of collateral estoppel, even when correctly applied, is to be extended in its application to bar all evidence on remaining issues in a case when such evidence also, even if inferentially or peripherally, applies to the issue collaterally estopped, the doctrine, as here, becomes a shield for the party against whom the doctrine is invoked. Its salutary purpose is perverted and litigants cannot safely invoke it even in a proper case. It is of crucial importance to the trial bar throughout the country that this perversion of the doctrine be rectified. The instant case is a classic example of where this court may do a service of national scope and importance in clarifying the impact of collateral estoppel and the evidence it permits or excludes in cases where it is properly invoked.

The policy of this court to eliminate or reduce unnecessary litigation, exemplified by the rules concerning multidistrict litigation (28 U.S.C. Sec. 1407) and by the use of the doctrine of collateral estoppel in a proper case to avoid the unnecessary relitigation of issues, will be advanced by a holding of this court as to the effect of the doctrine on what

evidence is to be admitted or excluded when the doctrine is properly invoked. The court's policy however will be prejudiced by the uncorrected perpetuation of the erroneous extension of the effect of the doctrine that is exemplified in the instant case.

III.

THIS CASE PRESENTS THE CONFLICT AMONG FEDERAL COURTS CONCERNING ADMISSIBILITY UNDER RULES 32(b) AND 32(d)(3), FEDERAL RULES OF CIVIL PROCEDURE, OF EVIDENCE NOT OBJECTED TO DURING A DEPOSITION TO OBTAIN EVIDENCE TO BE USED AT TRIAL.

A. Applicable Law.

Rule 32 (b) of the Federal Rules of Civil Procedure governs objections to admissibility of evidence obtained during a deposition:

> "(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

Rule 32 (d)(3) of the Rules also governs admissibility of evidence not objected to during a deposition and provides:

> "(d)(3) As to taking of deposition.
>
> (A) *Objections to the competency* of a witness or to the *competency, relevancy, or materiality* of testimony *are not waived* by failure to make them before or during the taking of the deposition, *unless the ground of the objection is one which might have been obviated or removed if presented at that time.*

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the *questions or answers,* in the oath or affirmation, or in the conduct of parties, *and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition. . . .*" (Emphasis supplied)

These rules have been interpreted among the federal circuits as simultaneously requiring and not requiring an objection during a deposition in order to preserve the objection for trial. A substantial number of cases generally permit objections at trial without their preservation during a deposition.[5] Other cases hold the opposite.[6] In *Thompson* v. *Thompson* (App. D.C., 1947), 164 F.2d 705 the court stated:

"Appellant contends that a deposition under the provisions of Rule 32 [presently Rule 32 (d)(3)(B)] of the Federal Rules of Civil Procedure, should have been rejected because it contained questions and answers to which objection might properly have been made and, if made, sustained. The rule is quite specific that errors occurring at the taking of a deposition which might be obviated, removed, or cured if promptly presented, are waived unless objection is made at the taking of the deposition. . . ."

This conflict involving Rules 32 (b) and 32 (d)(3) of the Federal Rules of Civil Procedure can be resolved by this court in the instant case. The child submits the better

[5] *Union Central Life Ins. Co.* v. *Burger* (S.D.N.Y. 1939), 27 F.Supp. 556; *Lewis* v. *United Air Lines Transport Corp.* (D.Conn. 1939), 27 F.Supp. 946; *Houser* v. *Snap-On Tools Corp.* (D.M.D. 1962), 202 F.Supp. 181.

[6] *Cordle* v. *Allied Chem. Corp.* (6 Cir. 1962), 309 F.2d 821; *Dudding* v. *Thorpe* (W.D.Pa. 1969), 47 FRD 565.

rule is the one requiring objection at the deposition especially when, as here, the purpose of the deposition is to preserve the testimony for trial.

B. The interpretation of Rules 32(b) and 32(d)(3) by the courts below and its prejudicial impact upon the child's case.

The district and circuit courts below concluded it was proper to preclude portions of testimony at trial despite the drug company's failure to object during the videotape deposition and thereby preserve said objection.

The child's principal medical witness on the medical cause issue was J. Gordon Millichap, M.D., the pediatric neurologist of the Mayo Clinic. He was in charge of the child's case from soon after his seizures developed in late 1961 and early 1962, treated him regularly at intervals throughouht 1962 until March 1963 and thereafter in Chicago in October 1973 and in May 1975.[7] He now practices in Chicago and was not able to be personally present at the trial. Accordingly, shortly before trial his videotape deposition was taken for use at the trial.

Dr. Millichap testified the Quadrigen shots and the defective condition of Quadrigen as found by the court were the cause of the child's brain damage.

The drug company's counsel engaged in a lengthy cross-examination of Dr. Millichap as to the basis for his opinions on cause, repeatedly questioning him on his knowledge, information and experience with other Quadrigen cases, in-

[7] The trial court permitted the videotape of Dr. Millichap's *direct* and *redirect* examination to be seen and heard by the jury; pursuant to the request of the drug company's counsel, however, *only certain portions* of Dr. Millichap's *cross* and *recross* examinations were read by him to the jury.

cluding one in which he was also the treating specialist and the drug company's counsel also had defended the company against the claim of a child that she had sustained brain damage from her Quadrigen shots. All of this was on the issue of whether Quadrigen was the cause of brain damage to recipients.

In response to that detailed and persistent probing, the drug company's counsel received answers establishing Dr. Millichap's personal experience with these other Quadrigen cases, his knowledge of the drug company's answers to interrogatories and of officially reported Quadrigen cases, all indicating a causal relationship between Quadrigen and brain damage and relevant as part of his background of prior knowledge and experience with Quadrigen upon which he based his opinion.

The drug company's counsel *made no objection to or motion to strike these answers when they were given* and although the court, before the videotape was heard by the jury, first ruled that the doctor's answers showing his personal experience with other Quadrigen cases were proper, the drug company's counsel persuaded the trial court to change its ruling and strike these answers of the doctor elicited on cross-examination which showed this important part of the basis of his opinions on the medical cause issue.

Having repeatedly suggested to the jury that "millions of shots" were given without incident and that Quadrigen shots would thus be a doubtful cause of brain damage, the drug company's counsel was understandably persistent in his efforts to persuade the court to strike those references to other cases in which Quadrigen shots had been found to be the cause of brain damage. His ultimate success, permitting him to edit out unfavorable answers he had elicited by his own cross-examination of Dr. Millichap,

effected a prejudicial "gutting" of the doctor's testimony and a substantial part of the basis for his opinion on medical cause. The impact of the doctor's testimony was weakened materially, especially as contrasted with the extensive references to other cases, literature and records permitted to the defendant's medical witness in support of his contrary opinions on the medical cause issue. Defense counsel was allowed to have *all* of the doctor's answers unfavorable to the drug company on this issue—and there were a number of such answers—*cut from the transcript before it was presented to the jury.*

Ironically the drug company's medical expert, Dr. Graven was later to testify:

> "And secondly, there is no evidence of any immunological literature or research and medical studies or any other such studies *to link* the injection of pertussis to the development of an immune response which has itself not been established through standard, accepted research techniques."

The excised testimony of Dr. Millichap on cross-examination should have been allowed on several grounds: it was highly material and relevant to the basis of the doctor's opinion on cause; it dealt not only with the doctor's experience and knowledge but also with the substantive fact that Quadrigen can and in this case, like in others, did *cause* brain damage—one of the major issues in this case. This was the very issue on which the drug company's medical expert disagreed with Dr. Millichap. The drug company was allowed to place the lengthy, narrative answers of its medical expert before the jury to support his opinion on the medical cause issue but successfully blocked from the jury crucial, proper testimony from the child's expert on the same issue.

The error and unfairness in striking this testimony is underscored by the fact that the videotape deposition of Dr. Millichap was not a mere discovery deposition; it was taken just before trial for use before the jury since he could not be available in Milwaukee to testify. The drug company's counsel, as he did with other medical witnesses of the child, cross-examined Dr. Millichap at great length on the basis of his opinion the medical cause of the child's brain damage was Quadrigen, and received answers severely unfavorable to the drug company. *No objection to or motion to strike these answers was made by the drug company's counsel when the deposition was taken.*

The child's counsel relied on that state of the record in gauging his redirect examination—realizing the net impact of the cross-examination, precisely because of the answers referred to above, was heavily favorable to the child. At the trial the drug company's counsel was erroneously permitted over strenuous objection to edit and *excise* these answers, thus altering the substance of the doctor's opinions and eliminating important parts of the basis for his opinion, *at a time when it was too late for the child's counsel to put these matters in on redirect examination.*

The trial judge justified these exclusions on the ground "this testimony dealt with prior claims against the defendant on the issues of negligence and defect which the parties had been collaterally estopped from relitigating. Such testimony, given the court's ruling, would have been cumulative at best and more probably misleading and prejudicial to the defendant, since it was not probative of or relevant to the remaining issues in the case."

This again was an erroneous over-extension of the effect of his prior ruling collaterally estopping the drug company from relitigating the issues of defect and negligence. The Millichap testimony was not cumulative because it bore particularly upon the basis of his opinion the shots were the cause of the child's brain damage. It was particularly probative in that it was elicited by cross-examination. The jury was entitled to know Dr. Millichap's opinion on cause was based not only upon his personal treatment of the child but also upon his knowledge of other Quadrigen cases in which this drug was found to have been the cause of brain damage, including cases he treated himself, and *to consider that in weighing his opinion against the contrary opinion of Dr. Graven* who never saw the child and whose testimony was replete with references to prior personal experiences, literature and other cases he had considered in forming his opinion. It was highly prejudicial to the child to exclude this testimony, particularly in view of what the drug company was allowed to present in support of Dr. Graven's contrary opinion on the medical cause issue.

This court may, in reviewing the instant case, clarify the requirements under Rule 32 concerning whether or not *it is necessary to reserve an objection to testimony received during a deposition in order to have it ruled upon at trial.* The impact of the exclusion of Dr. Millichap's testimony upon the child's case was catastrophic, especially so in view of Dr. Graven's later testimony for the drug company.

IV.

THIS CASE PRESENTS FOR RESOLUTION THE QUESTION, OF NATIONAL IMPORTANCE TO THE TRIAL BAR, WHETHER ERRONEOUS EXCLUSION OF RELEVANT AND MATERIAL EVIDENCE OFFERED BY THE LOSING PARTY HAVING THE BURDEN OF PROOF IS GROUND FOR A NEW TRIAL EVEN THOUGH THERE IS OTHER EVIDENCE IN THE RECORD THAT WOULD HAVE SUPPORTED A VERDICT IN FAVOR OF THE LOSING PARTY.

The importance of a definitive clarification and resolution of this question by this court is demonstrated by what happened in the instant case.

In the instant case the trial court concluded there were "clear" issues whether Quadrigen was available and whether it caused the child's injuries, and that there was sufficient evidence to go to the jury on both these issues. That is why he submitted those issues to the jury. The trial court's decision declined a new trial in the interest of justice on the ground the record contained evidence that "was credible and probative of the remaining issues in the case and the jury was entitled to rely upon it in reaching its verdict." The appeals court herein also rejected the child's request for a new trial on the ground that "as shown in both briefs of plaintiff, the record was replete with evidence favorable to the child." The court distinguishes the instant case from *Vincent* v. *Thompson,* 377 N.Y.Supp.2d 118, 131 on the ground that in *Vincent* the plaintiffs' reliance on the doctrine of collateral estoppel caused them "to fail to present evidence which may have been relevant to the establishment, to the jury's satisfaction, that the injuries suffered by the infant plaintiff came from the injection of a defective ingredient in

Quadrigen. Unlike that case, this plaintiff was afforded ample opportunity to present a plethora of evidence showing that Quadrigen had been administered to him and had caused his serious ailments."

We respectfully submit that both the district and appeals courts erred in their approach to this issue. The district court erred because the issue on the child's motion for a new trial was *not* whether there was evidence to sustain a verdict for the drug company. The issue was whether the trial court *erroneously excluded evidence that should have been heard and considered by the jury in deciding the issues of identification* or availability of Quadrigen *and medical cause.* Similarly, the appeals court erred because the issue was *not* whether the child was precluded by the court's erroneous rulings under his collateral estoppel order from introducing any evidence on the issues of identification and medical cause. The issue was whether the court *erroneously excluded relevant and material evidence* offered by the child on those issues which should *also* have been admitted along with his evidence which *was* admitted to assist the child in sustaining his burden of proof on those issues and which evidence, had it been admitted as it properly should have been, might have *tipped the scales in the child's favor in the minds of the jurors.*

Here we have a case in which the scales of justice contained evidence on each side. But the trial court instructed the jury that the child had the burden of proof

> ". . . to satisfy you to a reasonable certainty by the *greater weight* of the credible evidence, that you should find for the plaintiff. If you are not so satisfied, you must find for the defendant. . . By the greater weight of the credible evidence is meant evidence which when

> weighed against that opposed to it has more convincing power. . . Therefore, in order to return a verdict in favor of the plaintiff, you must find, (1) that the greater weight of the evidence supports a finding that Parke-Davis Quadrigen was used to inoculate Scott Grant in October, November and December, 1961. And secondly that if it was used to inoculate Scott Grant, that those inoculations of Quadrigen were the competent producing cause of his injuries. . . If you are not satisfied on each of those questions then you should return a verdict in favor of the defendant."

Under these instructions it was crucial that relevant and material evidence in favor of the child on these issues should not have been excluded. The appeals court stated:

> "Considering the record as a whole, the barred evidence was limited and chiefly cumulative."

But if the court considers the type of evidence that was barred by the trial court's erroneous extension of the effect of his ruling on collateral estoppel, it is neither limited nor chiefly cumulative. It is evidence which went to the heart of the drug company's defense on both the remaining issues. To the extent, if any, it was cumulative, its weight nevertheless should have been added to the scales of justice in the child's favor, particularly under the instructions of the court.

The appeals court approached this question from the standpoint that because the child was able to produce evidence showing Quadrigen had been administered to him and had caused his serious ailments and that nevertheless the jury chose to believe the defendant's substantial contrary evidence, "we cannot second-guess the jury's verdict." We respectfully submit that because of this erroneous approach, it is the appeals court that is "second guessing" the jury's verdict: it is guessing that even though the

barred evidence had been given to the jury it would not have decided in the child's favor. With regard to the trial court's rulings barring the child from introducing the drug company's original answers to interrogatories, which were contradictory to and inconsistent with its defense at the trial, the appeals court states:

> "Although we might have permitted plaintiff to introduce some or all of these ten answers if we had been trying this case, we are fully satisfied that their admission would not have tilted the scales in plaintiff's favor."

We respectfully submit that this is where the guessing is being done. There is no guessing that the proffered evidence was both relevant and material under the rules stated above and that in view of the basic issue of the credibility of the drug company's defense the court's instruction on the burden of proof and the importance of the weight of evidence, the barred evidence, even if it were cumulative, should have been added to the scales in the child's favor. *And it is speculation on the part of the court to say that adding it would have made no difference.*

It was because of this erroneous approach also that the appeals court distinguished the *Vincent* case in 337 N.Y. Supp.2d 118 on the ground that in that case the court's application of collateral estoppel caused the plaintiffs "to fail to present evidence which may have been relevant to the establishment, to the jury's satisfaction, that the injuries suffered by the infant plaintiff came from the injection of a defective ingredient in Quadrigen." The fact is the *Vincent* holding that the child in that case should be afforded a new trial has *a fortiori* application to the instant case because here the child did not "*fail* to present evidence;" by the trial court's erroneous extension of the effect of collateral estoppel on the issue of defect the child

was *precluded* from presenting the evidence on both the medical cause and the identification issues detailed at length above, all of which was relevant and material and should have been considered by the jury, especially against the background of the court's instruction of burden of proof. Where the *weight* of the evidence was the vital factor the jury was instructed to consider in deciding whether the child had sustained his burden of proof, it was error *to keep from the jury* and *prevent them from weighing* the relevant and material evidence he was precluded from introducing by the court's erroneous extension of the effect of the application of collateral estoppel.

The error has been compounded by the approach of the appeals court here that, because there was *other* evidence the child was permitted to put into the record that would have sustained a verdict in the child's favor, an appellate court may speculate whether such additional evidence would have made a difference with the jury.

It is to prevent such erroneous approaches and speculation that a definitive ruling is sought from this court that new trials are not to be denied in such circumstances merely because there is other evidence in the record that would have supported a verdict for either side. Such a ruling would have national impact upon the disposition of actions in trial courts and importance to trial courts, litigants and the trial bar throughout the nation.

CONCLUSION

Chief Justice Berger has emphasized in public addresses the need for improvement in the trial of cases. This court and the United States Congress have spent much time developing rules of evidence and procedure to improve and expedite the trial of cases. This court has much interest in its supervisory power to prevent undesirable conflicts and

erroneous rulings in trial and appeals courts which provoke appeals, necessitate new trials, prevent litigants from having a full and fair trial and obtaining a just result.

This case presents a clear instance of where the exercise of the court's supervisory power would advance the accomplishment of these objectives because the questions presented in this request for certiorari are live and vital problems as to which trial judges and trial lawyers today on both sides of the trial table, particularly in products liability cases, are searching for correct answers. A definitive and clarifying opinion of this court on the questions involved would have a beneficial impact nationally on the efficient, expeditious and *just* disposition of cases in trial courts. These questions involve the proper use of interrogatories (one of the most frequently used discovery devices in present day trials), the proper effect of applying the salutary doctrine of collateral estoppel when used to avoid unnecessary relitigation of issues and to shorten trials, the proper procedure to follow with respect to timely and fair objections during discovery proceedings and the effect of erroneous rulings on motions for a new trial. These are all issues of virtually daily concern in litigation occurring nationally. From the standpoint of resolving questions of national scope, the resolution of which would be of national benefit, this court would confer a benefit upon litigants, trial courts and the trial bar to take this opportunity to rule upon these questions so clearly presented in this case.

The appeals court in this case expresses "our natural sympathies for the plaintiff's physical disability." We respectfully submit that only because of the erroneous position the court took on the questions involved in this petition for certiorari was the court unpersuaded that a new

trial was warranted. We believe that if that court and the district court had had the benefit of this court's resolution of these questions, the result in this case in both the district court and the appeals court would have been different. And whether different or not, the result would have been more clearly that of a full and fair trial, more clearly a *just* result and this totally paralyzed child would have had his day in court.

To advance the trial of cases closer to such a result in this and in other cases is a cause worthy of the consideration of this court.

We ask that this petition for certiorari be granted.

Respectfully,

ARLO MCKINNON and
GEORGE P. KERSTEN
CHARLES B. CANNON

Attorneys for Scott Grant, an infant, the Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Argued September 17, 1976

October 27, 1976.

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

SCOTT GRANT, an infant,

Plaintiff-Appellant,

No. 76-1222 v.

PARKE, DAVIS & CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 71-C-27

JOHN W. REYNOLDS, *Judge.*

ORDER

This diversity action was brought by a 15-year-old child to recover $2,000,000 for severe brain damage, with attendant symptoms, allegedly caused by a series of Quadrigen inoculations administered during his infancy. Quadrigen was a vaccine formerly produced by defendant Parke, Davis & Co., the well-known drug manufacturer. It was

a "4-in-1" product combining vaccine for pertussis (whooping cough), diphtheria, tetanus and poliomyelitis and was to be inoculated in three successive monthly injections.

Because of the trial court's ruling in *Vincent* v. *Thompson,* 361 N.Y. Supp.2d 282 (Sup.Ct. 1974), involving Quadrigen, but later reversed,[1] the district court, applying the collateral estoppel doctrine, instructed the jury to consider that if defendant's product was administered to plaintiff, it was "defective in that it exposed recipients to an unreasonable danger of damage to the brain and central nervous system." The core issues before the jury were whether Quadrigen was administered to the plaintiff and, if so, whether it caused his physical condition. After 16 trial days, the jury returned a general verdict for defendant, and the district court subsequently denied plaintiff's motion for a new trial.

In asking us to direct a new trial, plaintiff presents three principal arguments. First, it is asserted that he should have been permitted to introduce into evidence ten of the original answers to his interrogatories to defendant. Next, plaintiff claims that certain testimony of witnesses was wrongfully excluded. Finally, it is contended that the district court's pre-trial collateral estoppel order (obtained

[1] The reversal (six months after this trial) granting Parke, Davis a new trial is reported in 373 N.Y.Supp.2d 118 (App.Div. 1975). There the appellate court held that Parke, Davis should be permitted to introduce evidence showing the lack of a causal relationship between the administration of Quadrigen and the infant's injuries. At the new trial, those plaintiffs would also have an opportunity to present causal evidence. However, plaintiff concedes that "the appellate decision in *Vincent* affirms the correctness of applying collateral estoppel in the instant case" (reply br. 2).

by plaintiff and holding that defendant was negligent in manufacturing and distributing Quadrigen because it was a defective drug, inadequately tested, and with inadequate warnings) was applied to prevent plaintiff from fully litigating the case. We affirm.

I. *Exclusion of Original Answers to Ten Interrogatories*

As noted, the trial court prohibited plaintiff from introducing into evidence defendant's original answers to ten of his written interrogatories to defendant. We discuss them in the order in which they are discussed in plaintiff's brief.

Interrogatories 13 and 14 asked whether Quadrigen had ever been withdrawn from the market and whether its production had ever been suspended. Defendant first answered these interrogatories by stating that Quadrigen had not been withdrawn from the market but that its manufacture and distribution were discontinued some time prior to May 5, 1967, when oral poliomyelitis vaccine came on the market, thus causing Quadrigen to become commercially obsolete. Defendant's further answer to Interrogatory 13 is not inconsistent with its first answer, for it merely added that it still has a valid license from the Division of Biologics Standards of the National Institute of Health (DBS) permitting it to manufacture and distribute Quadrigen.

Its further answer to Interrogatory 14 contained the various release and withdrawal from release [2] dates of lots

[2] "Withdrawal from the market" is to be distinguished from "withdrawal from release." The first term indicates a recall of vaccine lots already released by the DBS. The second term indicates the cancellation of a drug manufacturer's request that certain vaccine lots be released by the DBS.

of Quadrigen, the final release date being November 27, 1966. The answer also supplied the dating periods fixed by the DBS and showed that the last 1961 Quadrigen expiration date was September 20, 1961.

While the further answers to Interrogatories 13 and 14 amplified the original answers, they are not inconsistent therewith. It was unnecessary to submit defendant's original 13 and 14 answers to the jury because they did not support plaintiff's case nor contradict the defense that Quadrigen was not available on October 5, November 4, and December 7, 1961, when plaintiff received his shots.

The next two original answers plaintiff claims were erroneously excluded from the jury were the answers to Interrogatories 7 and 10. Interrogatory 7 inquired when Quadrigen was first offered for sale to the public and defendant answered that it was a prescription product that was made available only to members of the medical profession commencing about July 10, 1959.

Interrogatory 10 and its answer read as follows:

"Identify each Quadrigen package insert (including without limitation each document, pamphlet, flyer or other descriptive material inserted in, or accompanying any package or shipment of Quadrigen), and as to each such item, state:

"(a) the instructions contained therein as to dosage and use of Quadrigen;

"(b) warnings as to potential side effects of Quadrigen;

"(c) the persons you intended should reach such item;

"(d) state the complete content of each such item or attach a copy to your answer.

ANSWER

"Attached hereto as Exhibit 1 are copies of the package inserts that accompanied each package of Quadrigen:

"Insert Symbol	Use Dates
WM	7/16/59 to 9/29/59
ZD	9/29/59 to 3/26/62

"Also attached as Exhibit 1 are the following:

"1. Quadrigen vial labels

"2. Quadrigen cartons

"3. Ten package labels

"4. One-hundred package labels

"a), (b), (d) See Exhibit 1.

"(c) The package insert, individual carton and vial label were intended to be read by members of the medical profession. The ten package and one-hundred package labels were intended to communicate identity of contents, handling and storage instructions, and, as such, were intended to be read by distribution center employees and others that might come in contact with the cartons during transit."

Plaintiff insists that the fifth (or ZD) line of the answer to Interrogatory 10 would show that Quadrigen was available at all times during that 1959-1962 period. However, the fact that defendant used a particular form of printed package inserts (Exhibit 1 to Answer 10) between those dates of course does not show that Quadrigen was actually available to patients throughout that period. Defendant submitted no further answers to Interrogatories 7 and 10. When read in context with the two interrogatories and with said Exhibit 1, these answers do not show that Quadrigen

was available to inoculate plaintiff in October, November and December 1961. Therefore, there was no need to submit them to the jury.

Plaintiff next states that the defendant's original answers to Interrogatories 9, 26, 27 and 30 should have gone to the jury. However, these answers were given when defendant had not yet discovered the underlying records later found in Detroit and in Skokie, Illinois, which served as the basis of further answers showing that Quadrigen, within its expiration date, was not available in 1961 after September 20. Consequently, it is immaterial that defendant originally answered Interrogatories 9, 26, 27 and 30 by asserting lack of records or insufficient information.

Finally, plaintiff assails the exclusion from evidence of defendant's original answers to Interrogatories 21 and 22.[3] The first of these interrogatories asked whether Parke, Davis contended that an injection of any such 4-in-1 or other combination vaccine "manufactured by any other drug manufacturer prior to or in December 1961," could cause the ill effects suffered by plaintiff. The answer was, "Any pertussis (whooping cough) containing vaccine could conceivably cause a reaction. Defendant, however, does not admit that Scott Grant did suffer a pertussis reaction." However, four and one-half months later, the trial judge issued his formal ruling applying the doctrine of collateral estoppel so that defendant could not relitigate the defectiveness of its product exposing recipients to an "unreasonable damage to the brain and central nervous system."

[3] Defendant did not file further or supplemental answers to Interrogatory 21. Plaintiff's brief does not mention defendant's supplemental answer to Interrogatory 22(e), so that we need not comment thereon.

Therefore, the first part of this answer was no longer at issue; the second portion was in no way helpful to plaintiff. Accordingly, the exclusion of this answer from the jury was permissible.

Interrogatory No. 22 and defendant's answer read as follows:

> "If your answer to interrogatory No. 21 is anything other than an unqualified negative, then answer each of the following questions:
>
> "(a) identify the pharmaceutical, biological or drug you contend could cause such ill effects, giving also the trade name and manufacturer of each such product;
>
> "(b) identify each component, factor, aspect and/or feature of such inoculation, biological or drug which you contend is the precise causative agent which could and/or did produce side effects;
>
> "(c) identify each authority which you contend supports your answer to subparagraph (a) or (b) of this interrogatory;
>
> "(d) describe in detail your reason for your answers to subparagraphs (a) and (b) of this interrogatory;
>
> "(e) describe each case in which you contend a child received brain damage or other ill-effects such as was suffered by Scott Grant from an inoculation manufactured by other drug manufacturers, giving the name of such manufacturer, the drug in question, the trade name of such product, the child in question and the source of your information.

ANSWER

"(a) See interrogatory No. 20.

"(b) The most probable component which could cause brain damage is the pertussis component.

"(c) Defendant relies generally on the published scientific literature on Pertussis. This literature is extremely voluminous and dates back many years.

"(d) There are a number of literature reports which have reported an association of encephaletic reactions and pertussis. The reports include such a reaction as being associated with the disease pertussis and the pertussis vaccine. Fortunately, the risk of such a reaction as a result of the vaccine is extremely rare.

"(e) Defendant has no first-hand knowledge concerning reactions to other manufacturers' vaccines but relies on the published scientific literature on Pertussis."

Again, at trial defendant was not contesting the possibility of the pertussis component of Quadrigen causing brain damage. This issue was removed from the case with the district court's pre-trial collateral estoppel ruling. Moreover, defendant's further answer to Interrogatory 30 denied that plaintiff had been injected with Quadrigen, and its original answer to Interrogatory 31 showed that it was relying in that regard on the office records and deposition testimony of plaintiff's pediatrician. That answer also claimed that if plaintiff had suffered a pertussis reaction, anyone's pertussis vaccine could have been responsible. Finally, plaintiff's witness, Dr. Millichap, in his deposition, and defendant's expert, Dr. Graven, in his testimony, agreed that pertussis was sometimes associated with brain damage. Because defectiveness of the vaccine was resolved by the court's collateral estoppel ruling and by the medical witnesses, the answers to these interrogatories were cumulative at best and not useful for impeachment purposes, we cannot fault the district court for excluding the original answers to Interrogatories 21 and 22.

While plaintiff points out that under Rule 33(b) of the Federal Rules of Civil Procedure, answers to interrogatories "may be used to the extent permitted by the rules of evidence," he overlooks Rule 403 of the Federal Rules of Evidence which permits a court to exclude, *inter alia,* cumulative evidence or evidence that may mislead the jury. This permitted the trial judge to exclude the ten original interrogatory answers that plaintiff sought to introduce into evidence.[4] We agree with Judge Reynolds and Moore's

---

[4] Rule 403 did not become effective until after this trial was completed. Thus there is an initial question as to what evidentiary standards should have been applied governing the admissibility of evidence at trial. Under the form of Rule 43(a) of the Federal Rules of Civil Procedure that was current at the time of trial, the yardstick for admissibility of evidence in a diversity case was set at the more liberal between the admission standards used in the state in which the federal court sat and those "heretobefore applied in the courts of the United States on the hearing of suits in equity." 5 Moore's *Federal Practice,* ¶ 74.01[10] at 6 (2d ed. 1976).

However, the Wisconsin Rules of Evidence were effective and applied during this trial, and Wisconsin Rule 904.03 is identical to Rule 403. Further, with regard to exclusion because of cumulative evidence or evidence that may mislead the jury, such an exclusionary standard seems to have been quite uniform through the federal and state courts. McCormick on Evidence, § 185 at 438-41 (2d ed. 1972). Within this Circuit evidence of such remote probative value was properly excludable under the standards antedating the Federal Rules of Evidence. *United States* v. *Gorman,* 393 F.2d 209, 212 (7th Cir. 1968), certiorari denied, 393 U.S. 832. Therefore, Parke, Davis' original answers to the plaintiff's interrogatories were properly excluded.

Finally, it may be noted that even before the adoption of the Federal Rules of Evidence, this Court encouraged district courts to use the proposed rules as guides in ruling on evidence questions. E.g., *United States* v. *McCarthy,* 445 F.2d 587, 591 (7th Cir. 1971); see *Case & Co., Inc.* v. *Board of Trade of City of Chicago,* 523 F.2d 355, 361 (7th Cir. 1975). Rule 403 in the proposed draft available to the district court at the time of trial was substantially the same as the rule finally adopted by Congress.

Treatise that "the discovery rules are not to be used as a tactical device for tying a party down to a disadvantageous position or for suppressing facts." 4A Moore's *Federal Practice,* §33.29(2) at 171 (2d ed. 1975).

Although we might have permitted plaintiff to introduce some or all of these ten answers if we had been trying this case, we are fully satisfied that their admission would not have tilted the scales in plaintiff's favor. Their exclusion, if at all erroneous, does not amount to reversible error.

II. *Exclusion of Certain Testimony*

A. *Striking Portions of Dr. Millichap's Testimony*

As to the issue of medical cause, plaintiff's principal witness was Dr. J. Gordon Millichap who was then a pediatric neurologist at the Mayo Clinic in charge of plaintiff's case after his seizure developed in late 1961 and early 1962. Dr. Millichap treated the plaintiff regularly at intervals from 1962 until March 1963 and again, in Chicago, in October 1973 and in May 1975. Since Dr. Millichap was not able to be present in Milwaukee at the time of the trial, his video-tape deposition was taken before hand for trial use. The crux of his testimony was that the Quadrigen shots caused the plaintiff's brain damage. The trial court permitted the video-tape of his direct and redirect examination to be seen and heard by the jury. Similarly, most of the cross and recross examinations of Dr. Millichap were presented to the jury. Under the trial court's pre-trial collateral estoppel ruling, both parties were prohibited from litigating the issues of defect and negligence. Applying that ruling, Judge Reynolds granted defense counsel's motion to strike some of Dr. Millichap's answers on cross-examination. Only eight and one-half pages (including questions of defense counsel) of Dr. Millichap's 340-page

deposition were stricken. The stricken material largely concerned Dr. Millichap's knowledge of several litigated cases involving Quadrigen and another settled case also involving Quadrigen. Because of the collateral estoppel order that plaintiff had secured from Judge Reynolds, he concluded the stricken material involved defect or negligence, issues that were removed from the case by virtue of the collateral estoppel order. Our review of the stricken material shows that it mostly related to other Quadrigen cases against Parke, Davis and was therefore barred by the collateral estoppel ruling. Since the defectiveness of Quadrigen and negligence of defendant had been established by the collateral estoppel ruling, it was permissible for Judge Reynolds to strike the evidence as cumulative under Rule 403 of the Federal Rules of Evidence, or its predecessor, Rule 904.03 of the Wisconsin Rules of Evidence.[5] Some of the stricken testimony was favorable to defendant. The rest of it was so minor in its probative value on causation with respect to Scott Grant in comparison to Dr. Millichap's devastating testimony heard by the jury that no prejudicial error (assuming there be any error at all) occurred.[6]

---

[5] See note 4 *supra.*

[6] Quadrigen's defectiveness was described in the collateral estoppel order in the following language:

> "As formulated, manufactured, and distributed by defendant Parke, Davis & Co., Quadrigen, when it left the possession of the defendant, was defective in that it exposed recipients to an unreasonable danger of damage to the brain and central nervous system."

This portion of the collateral estoppel order established that Quadrigen could cause brain damage. Bolstering this conclusion by way of specific examples where causation was actually found is, of course, immaterial to the question whether Scott Grant's brain damage *in particular* was caused by Quadrigen.

B. *Exclusion of William C. Roemer's Deposition Testimony.*

At the trial, plaintiff sought to introduce certain deposition testimony of William C. Roemer, defendant's house counsel in charge of litigation involving biological products in general. Specifically, plaintiff wished the jury to have the portions of the Roemer deposition dealing with the corporate destruction of "quality control files" containing adverse reaction reports on Quadrigen. The district court sustained an objection on the ground that the subject was foreclosed by the collateral estoppel order. Because plaintiff was unable to show that these records would have proved that plaintiff was administered[7] Quadrigen or injured[8] by it, they were not relevant to the issues before the jury. Again, the exclusion was allowable under Federal Rule of Evidence 403 and Wisconsin Rule of Evidence 904.03.[9]

---

[7] Since there was no action pending or claim made where injections of Quadrigen were alleged to have been given in the later part of 1961, all quality control files pertaining to this period would have been destroyed in the normal course of business prior to the filing of the Grant action in 1969.

[8] In effect, plaintiff maintains that the destroyed records might have presented complaints further defining the symptomatology of Quadrigen reactions so that it intersected with Scott Grant's symptoms. In face of the fact that the destruction of the records was adequately explained without adverse innuendo (see note 7, *supra*), any affirmative probative value of the absence of the records on the causation issue was rendered nugatory. As to the less tenable proposition that other adverse reactions from Quadrigen disclosed in the destroyed records might show that Scott Grant's disabilities were caused by Quadrigen, see note 6, *supra*.

[9] See note 4, *supra*.

C. *Limitation of Cross-Examination of Dr. Graven*

In his cross-examination of Dr. Graven, defendant's medical witness, plaintiff's counsel attempted to show that Quadrigen could become unstable through handling and changes in temperature, so that a defect could develop some time after manufacture. Dr. Graven's central reason for concluding that Quadrigen was not the cause of plaintiff's brain damage was the fact that plaintiff's reaction did not occur abruptly after the alleged injections while the available medical information shows that pertussis-associated reactions always occur abruptly after the administration of pertussis vaccine. Plaintiff contends that his line of questioning was intended to rebut Dr. Graven's conclusion on the cause issue. The court sustained objection to this kind of testimony on the ground that plaintiff was again endeavoring to bring in evidence showing defect even though that issue had been removed from the case through the collateral estoppel ruling. The trial court was within its rights in considering this matter as cumulative evidence on defect.[10]

---

[10] In his brief plaintiff suggests a reason for introducing the cross-examination on the issue of causation:

> "to show that changes can occur in Quadrigen as a result of handling and temperature variations during shipment and storage which would result in variability in reactions to it, so that Quadrigen could not be ruled out as a cause just because the symptoms [did not occur abruptly]" (Br. 41).

However, Dr. Graven's conclusion was based on the association of a pertussis injection with the appearance of an adverse reaction shortly following the inoculation since the mechanism of the pertussis reaction itself is unknown. Because the mechanism is a mystery, the probative value of the unstable character of Quadrigen on the causation issue could have been too remote to admit at trial even as a matter of relevance. It certainly was too remote to overcome the prejudicial effect of its cumulative impact on the non-issue of defect.

D. *Limitation of Cross-Examination of Dr. Timm*

Dr. Timm was the defendant's director of quality control and testified that effective April 13, 1961, the Government reduced the expiration date on Quadrigen from six months after release to four months. The plaintiff sought to show in cross-examining Timm that doctors thereafter returned Quadrigen not because of the new expiration dates but because Quadrigen was unstable. This line of questioning of course bore on the defect of the product, which was covered by the pre-trial collateral estoppel order. Plaintiff's counsel also attempted to show that after the government regulations establishing the new expiration date for Quadrigen became effective, defendant did not recall already issued Quadrigen. Since Parke, Davis admitted that Quadrigen was never recalled, the district judge interpreted counsel's questioning as again bearing on defect. While it might have been preferable to let this question be answered, there was no need to do so because it was an undisputed matter. Since the matters that plaintiff sought to establish through cross-examination of Dr. Timm related to the defectiveness of Quadrigen,[11] this line of inquiry was barred by the collateral estoppel order.

III. *Application of Collateral Estoppel Order*

Plaintiff's final attack on fairness of the trial is that the collateral estoppel order, which he obtained, was applied to bar him from showing that Quadrigen had been administered to plaintiff and had caused his serious physical problems. We disagree. As shown in both briefs of plaintiff, the record was replete with evidence favorable

[11] In effect, this is even admitted at pages 4-5 of plaintiff's reply brief.

to the child. Considering the record as a whole, the barred evidence was limited and chiefly cumulative. In *Vincent* v. *Thompson*, 337 N.Y.Supp. 2d 118, 131 (App. Div. 1975), the plaintiffs were lulled "into a false sense of security" by their reliance on the doctrine of collateral estoppel, thus causing them "to fail to present evidence which may have been relevant to the establishment, to the jury's satisfaction, that the injuries suffered by the infant plaintiff came from the injection of a defective ingredient in Quadrigen." Unlike that case, this plaintiff was afforded ample opportunity to present a plethora of evidence showing that Quadrigen had been administered to him and had caused his serious ailments. Nevertheless, the jury chose to believe defendant's substantial contrary evidence. We cannot second-guess the jury's verdict. Despite our natural sympathies for the plaintiff's physical disabilities, we are unpersuaded that a new trial is warranted.

Judgment affirmed.[12]

[12] Defendant's motion for summary affirmance under Circuit Rule 15 (then Circuit Rule 22) was denied on June 28, 1976. Its motion to strike portions of plaintiff's principal brief is hereby denied.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCOTT GRANT, an infant,

Plaintiff,

v.

PARKE, DAVIS & CO.,

Defendant.

Civil Action — No. 71-C-27

DECISION AND ORDER

This is a diversity action originally brought in the United States District Court for the Southern District of New York and transferred by order of that court to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1404(a).[1] The plaintiff Scott Grant, by his father, and his father personally,[2] sought substantial monetary relief from the defendant, alleging that the defendant negligently manufactured and distributed to the medical profession a pharmaceutical product known as "Quadrigen" which was later administered to the plaintiff by a physician for the purpose of

---

[1] Section 1404(a) of Title 28, United States Code, provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[2] Scott Grant's father was later dismissed as a separate party plaintiff.

routine immunization. As a result of this innoculation, the plaintiff alleges severe and serious injury. The case came on for jury trial June 2, 1975. After sixteen days of testimony, argument, and instructions, the jury returned a general verdict in favor of the defendant.

Plaintiff has now moved for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is denied.

I.

The plaintiff asserts three distinct grounds in support of its motion for a new trial. First, plaintiff argues that the Court erred in prohibiting the plaintiff from introducing into evidence at trial certain answers defendant made on December 13, 1974, to written interrogatories propounded by the plaintiff. These answers were requested to be admitted to demonstrate that the defendant had changed its position on certain issues. Plaintiff claims prejudice in that cross-examination of defendant's witnesses was limited at trial in reliance upon the ability to later introduce these answers. Second, the plaintiff asserts that the Court erred in excluding certain testimony of witnesses. This testimony sought to put before the jury evidence of similar claims against the defendant, evidence that certain business records of the defendant had been destroyed, and evidence tending to show that Quadrigen was a defective product (an issue foreclosed by the court's collateral estoppel ruling, as more fully detailed below). Finally, plaintiff asserts that the interests of justice require a new trial because the court's pretrial collateral estoppel order prevented the plaintiff from litigating fully and fairly the remaining issues in the case. On May 5, 1975, the court granted *plaintiff's* motion to estop Parke, Davis & Co. from relitigating the defectiveness of Quad-

rigen, including defendant's negligence in its manufacture, testing, and distribution, and its failure to warn the medical profession and the public. Relying on *Stromsodt* v. *Parke-Davis and Co.*, 257 F.Supp. 991 (D. N.D. 1966), affirmed *Parke-Davis and Co.* v. *Stromsodt*, 411 F.2d 1390 (8th Cir. 1969); *Tinnerholm* v. *Parke-Davis & Co.*, 285 F.Supp. 432 (S.D. N.Y. 1968), affirmed *Tinnerholm* v. *Parke-Davis & Co.*, 411 F.2d 48 (2d Cir. 1969); and the reasoning expressed by the court in *Vincent* v. *Thompson, Parke-Davis & Co.*, 79 Misc. 2d 1029, 361 N.Y.S.2d 282 (S.Ct. 1974), this Court held that Quadrigen was defective when it left defendant's possession, that the defendant's testing and warnings to the medical profession were inadequate, and that in these respects Parke, Davis & Co. was negligent.[3] These issues were not permitted to be relitigated at trial.

---

[3] The May 5, 1975, order set forth the following as the findings of the court with respect to Quadrigen:

"1. As formulated, manufactured, and distributed by defendant Parke, Davis & Co., Quadrigen, when it left the possession of the defendant, was defective in that it exposed recipients to an unreasonable danger of damage to the brain and central nervous system.

"2. The defendant Parke, Davis & Co. improperly and inadequately tested its product Quadrigen in the face of evidence it was defective before releasing it to the retail market.

"3. The defendant Parke, Davis & Co. failed adequately to warn the medical profession of the risks inherent in the use of Quadrigen.

"4. By reason of the defendant Parke, Davis & Co.'s formulation, manufacture, and distribution of the dangerously defective product Quadrigen, the defendant's failure properly and adequately to test it and adequately to warn the medical profession of the risks inherent to its use, the defendant Parke, Davis & Co. was negligent."

II.

Rule 59(a) of the Federal Rules of Civil Procedure provides in relevant part:

> "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; * * *."

The generally recognized grounds for awarding new trials in jury actions include judicial error, a verdict not supported by legally sufficient evidence, and a verdict against the weight of the evidence. See generally, 6A Moore, Federal Practice ¶ 59.08 at 59-99—59-193 (2d ed. 1974), *Cf., Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940). A motion for a new trial invokes the trial court's discretion, and it has generally been held that a jury verdict should not be interfered with unless the trial court is convinced that the jury, for whatever reason, has reached a seriously erroneous result. 9 Wright & Miller, Federal Practice and Procedure §§ 2521-2532, 2537-2540, at 536-578, 596-621 (1971). It is with these principles in mind that the instant motion must be decided.

III.

Plaintiff's counsel has argued vigorously that it was error to prevent him from reading to the jury certain answers to interrogatories filed by the defendant on December 13, 1974, which are allegedly inconsistent with later answers. This Court cannot agree. These answers were prepared before the collateral estoppel order was entered, so that the issues of negligence and defect were prominent in the parties' thinking and the answers were

given in that context. Moreover, once the collateral estoppel order was entered, these answers were largely irrelevant and could only serve to confuse and distract the jury with respect to the remaining issues of identification of Quadrigen as the drug administered to the plaintiff and the medical causation of the plaintiff's injuries.

Plaintiff's counsel desired to introduce certain answers to impeach the testimony of some of defendant's witnesses. But these answers were based on a lack of information and were substituted for once the relevant business records were discovered. These records speak for themselves, and the prior answers, given when the records had not been discovered, do not constitute proper impeachment. Professor Moore has spoken to this point quite effectively:

> "• • • [A] party should not be bound by answers to interrogatories if subsequent investigation discloses new facts; the discovery rules are not to be used as a tactical device for tying a party down to a disadvantageous position or for suppressing facts. • • •" 4A Moore, Federal Practice ¶ 33.29[2] at 33-171 (2d ed. 1975).

To allow the answers plaintiff desired to be read into evidence would have improperly confused and mislead the jury and were properly excluded.

Similar reasoning can be used to analyze the testimony of witnesses that the court excluded. This testimony dealt with prior claims against the defendant and the issues of negligence and defect which the parties had been collaterally estopped from relitigating. Such testimony, given the court's ruling, would have been cumulative at best and more probably misleading and prejudicial to the defendant, since it was not probative of or relevant to the remaining issues in the case. Therefore, this proffered testimony was also properly excluded.

Finally, the Court finds plaintiff's argument that the interests of justice require a new trial unavailing. There is substantial evidence in the record to support a finding that the plaintiff never received Quadrigen, or that even if he did, Quadrigen was not the medical cause of his injuries. Since the general verdict for the defendant must stand if supportable on *either* question, in view of the record in this case the Court finds no basis to set the jury's conclusion aside. The defendant's evidence was credible and probative of the remaining issues in this case, and the jury was entitled to rely upon it in reaching its verdict.

It Is Therefore Ordered that plaintiff's motion for a new trial must be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 27th day of January, 1976.

John W. Reynolds

Chief U. S. District Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Rule 32(b), Federal Rules of Civil Procedure:

"(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

Rule 32(d)(3), Federal Rules of Civil Procedure:

"(3) As to taking of deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

• • • •

Rule 33(b), Federal Rules of Civil Procedure:

"(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence."

• • • •

Rule 401, Federal Rules of Evidence:

"DEFINITION OF 'RELEVANT EVIDENCE'

'Relevant evidence, means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Rule 402, Federal Rules of Evidence:

"RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

Rule 403, Federal Rules of Evidence:

"EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Wisconsin Statutes, Sec. 904.03:

"904.03. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."